DOCUMENT RESUME

ED 188 617 IR 008 484

AUTHOR Flint, Carl: Peters, Marybeth
TITLE The Six Basic Needs of Education vs. Public Law 94-533 Copyright Act of 1976.
INSTITUTION Public Health Service (DHEW), Atlanta, Ga.
PUB DATE 17 May 78
NOTE 37p.

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS *Copyrights: *Educational Needs: *Federal Legislation: *Information Dissemination: Information Needs: Laws: *Medical Education: *Reprography
IDENTIFIERS Copyright Law 1976

ABSTRACT

Developed as a service for the Health Sciences Academic Community, this 5-part monograph explores the impact of the new copyright law PL 94-553 on the basic needs of education. Part one, in the form of an illustrated lecture, enumerates six basic needs of education--the right to make copies, the doctrine of fair use, permission to duplicate copyrighted material, protection against infringement, future instructional requirements, and ready access to materials--and discusses their relationships to the provisions of PL 94-553. Part two provides an in-depth response to the concerns of the educational community and defends the provisions of the new law in their application to these basic needs. Ten fictional case histories are recounted in part three to provide a basis for discussion of possible and probable problems, and conclusions are presented in part four. The monograph concludes with six general references on legislative enactment of the new law and its educational aspects. (RAA)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED188617

U S DEPARTMENT OF HEALTH,
EDUCATION & WELFARE
NATIONAL INSTITUTE OF
EDUCATION

THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

The Six Basic Needs of Education VS. Public Law 94-553 Copyright Act of 1976

by
Carl Flint, J.D., L.L.M.
National Medical Audiovisual Center
National Library of Medicine
and
Marybeth Peters, J.D.
Ch. Information & Reference Division
Copyright Office
Library of Congress

This monograph was developed as a service to the Health Sciences Academic Community by the National Medical Audiovisual Center, National Library of Medicine.

The views expressed in the monograph are those of the authors. They are intended to serve as guidelines and should not be interpreted as an official statement of the Department of Health, Education, and Welfare or the Copyright Office, Library of Congress.

U.S. Department of Health, Education and Welfare
Public Health Services
National Institutes of Health
National Library of Medicine
National Medical Audiovisual Center
Atlanta, Georgia 30333

IR008484

About the Authors

CARL FLINT is Chief of the Materials Utilization Branch, National Medical Audiovisual Center, National Library of Medicine. He retired from the U.S. Army Pictorial Center in June 1964 and joined the staff of the National Medical Audiovisual Center in November of that same year. He brought to the organization a total of 35 years of experience in the communications arts.

Mr. Flint has written many articles in the field of visual communications. He was a foreign delegate to the International Conference on the Survival of Humankind: The Philippine Experiment, Manila, Philippines, September 1976, where he presented a paper on Communications Technology for Medical Education. He attended the Columbia University School of Communications, the University of Maryland, and he received the degrees of Juris Doctor and a Master of Laws from the Woodrow Wilson College of Law in 1970.

MARYBETH PETERS is the Chief of the Information and Reference Division of the Copyright Office. She is also currently serving as the "Training Officer" in the new copyright law. She co-teaches the course on copyright at the Georgetown University Law Center. She is a frequent lecturer on the new law and has appeared before many professional groups. Previously Ms. Peters was Senior Attorney on the staff of the General Counsel, Copyright Office, Library of Congress.

Ms. Peters received her B.S. degree from Rhode Island College, and in 1971 she received the degree of Juris Doctor with honors from the National Law Center of the George Washington University. She is a member of the District of Columbia Bar, the Federal Bar Association and is active in the Patent, Trademark, and Copyright Section of the American Bar Association.

PREFACE

The subject content of this monograph was first presented by Mr. Flint as an illustrated lecture at the final plenary session of the Health Sciences Communications Association, 20th Annual Meeting, Tucson, Arizona, May 17, 1978.

At the conclusion of Part I of the presentation, Ms. Peters addressed the audience and defended Public Law 94-553 as to whether the new copyright law did in fact answer the six basic needs of education. A more in-depth response by Ms. Peters to the concerns of the educational community will be found in Part II of the monograph.

APR 4 1980

CONTENTS

Preface iii

Part I. The Six Basic Needs of Education 1

Part II. Defense of Public Law 94-553 17

Part III. Ten Case Histories 23

Part IV. Conclusions to Case Histories 33

Part V. General References 37

PART I.

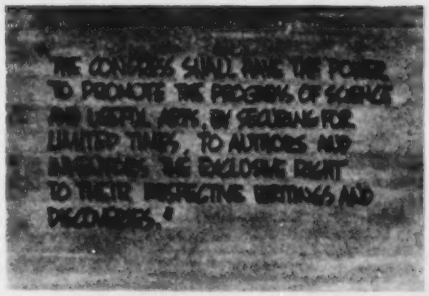
THE SIX BASIC NEEDS OF EDUCATION

—VS—

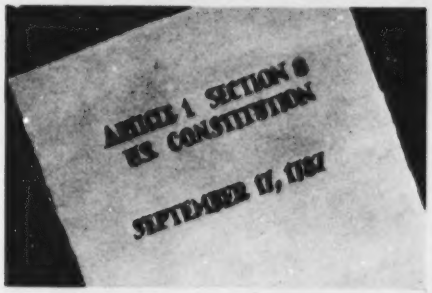
PUBLIC LAW 94-553
COPYRIGHT ACT OF 1976

CARL FLINT
National Medical Audiovisual Center
National Library of Medicine

The Congress shall have the power: To promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writing and discoveries. This statement, devoid of federal prose, and remarkable in its simplicity, clearly delineates the rights of a creator of an original work, as contained in. . .

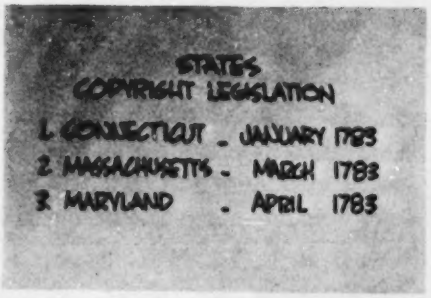


. . . Article 1, Section 8, of the U. S. Constitution and signed September 17, 1787.



Predating the Constitution, in 1672, the General Court for Elections of the Massachusetts Bay Colony established a legal precedent by putting all public printers on notice that they must not print more copies than what was agreed upon, and paid for, by the owner of the original copy. They also imposed triple damages for any printer who printed more copies without the permission of the copy owner.

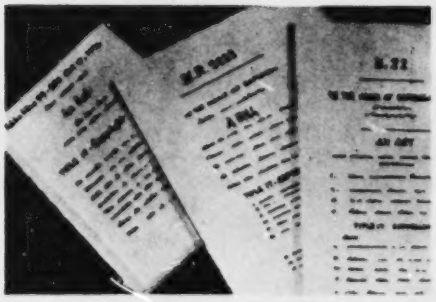
In turn, after the original states of the Union achieved independence, the State of Connecticut, in January 1783, became the first to adopt a copyright statute. Massachusetts followed in March and Maryland in April of the same year.



The Copyright Act of 1909 was subject to the limitations of the communication arts of that era. The chief method of communication was the printed word, pictorially enhanced by the use of early techniques of photoengravings of photographs and drawings in our newspapers, magazines, books, and other printed material.

The passage of that act in 1909 did not contemplate the marvels of modern communications technology. Edison was perfecting his talking machine and starting to experiment with motion pictures. There was no motion picture industry, commercial radio or television, since all the latter communications technology arrived on the contemporary scene within the last sixty years.

In essence, the Copyright Act of 1909 was geared to the level of the technology of the printing press.

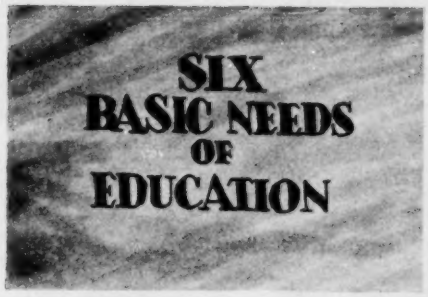


Although there were amendments to the Copyright Act of 1909 updating the act to meet the needs of newer technology, it still did not provide adequately for the needs of the burgeoning educational community.

The message from the creators of original works, plus those of the educational communities, was loud and clear. The need for revision was recognized, and the U. S. Congress responded in 1955 with the passage of appropriated funds to initiate a massive program of research in the revision of the act of 1909.

On October 19, 1976, President Ford signed into law Public Law 94-553, an act for the general revision of the copyright law. This new law became operative in part after signature by the President and went into full effect January 1, 1978.

It was during the hearings before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, during the years 1965-67, that the six fundamental needs of education, which must be protected in any revision of the Copyright Law, were forcefully delineated by the educational community.



And these are:
The right to make limited copies of copyrighted materials for classroom use.

The need to have the doctrine of "Fair Use" extended to include educational broadcasting and the educational use of computers.

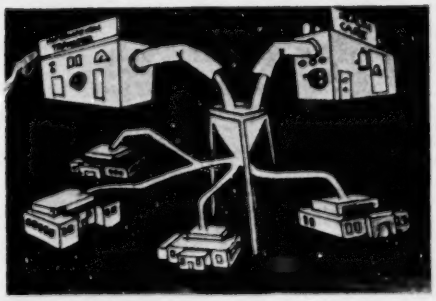
The need for a reasonable certainty that a given use of copyright material is permissible.

The need for protection of teachers and librarians, should they innocently infringe the law.

The need to meet future instructional requirements by utilizing new educational technology presently available to schools.

The need to have ready access to materials. (Lengthy delays in acquiring rights to copyrighted materials would be impractical.)

These basic needs were always critical to the teachers at all levels of the educational spectrum. The need for access to copyrighted material is further compounded by the volume of information that must be transferred to their students.



In the area of biomedical education, the rapidly increasing body of information contained in the universe of data bases of information transfer and health care is so voluminous that it has created a serious problem in transferring this information to the students in the schools of medicine and the allied health sciences.

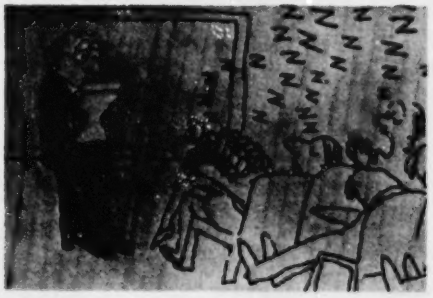
There is no doubt about the need for the teacher to keep pace with this rapidly increasing repository of scientific knowledge. Much of this information was created as original works and copyrighted.

Some enterprising medical faculty realized full well that in order to transfer this knowledge to their students, they must look into the innovations in teaching technology that have been developed in other areas.

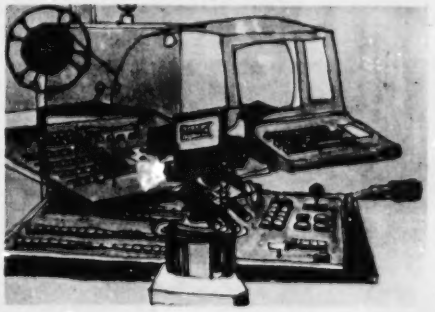
There was an abundance of educational "hardware" available to the teacher, and some of the little "black boxes" intrigued him to the point of motivation where he decided to try one of them. In this instance it was television.

So this inspired teacher had his lecture televised, and he was transported to his classroom on tape. The picture and sound were of reasonable quality, and he considered the experiment a success. After a few more televised lectures and in response to his students and colleagues, he decided to spice up his factual, wordy presentation by adding pictorial support. Needless to say, his lectures gained ten points on the students' ratings, and he was hooked.

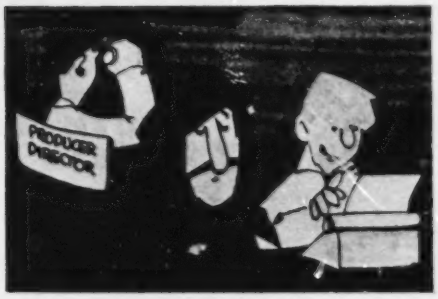
He improved the lectures and the aesthetics of his presentation. Now he was committed. He had broken the mold of the lecturer at the podium, droning his facts to his nodding students.



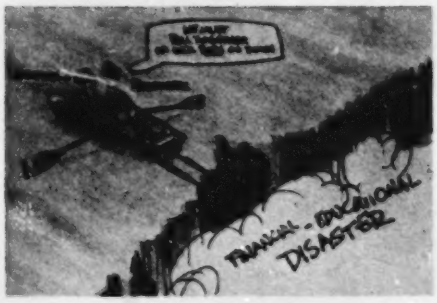
There was no question he increased his teaching power. Television made it easy. The more sophisticated the system, the simpler it became to incorporate all the mediated formats. In order to supply his teaching needs and to feed the voracious appetites of this new hardware, especially the computers, dry copiers, and the videocassette recorders, he turns with wild abandon to the "borrowing" of material from textbooks, motion pictures, slides, videotapes, and anything else he can get his hands on that will aid and enhance his teaching.



The teacher has now warmly embraced all the new technology offered to him by the "state of the communications arts" and is well on his way to a new approach in individually prescribed instruction. He has learned how to arrange a series of learning events that will allow a student to master the content at a pace most appropriate to his needs—so much for the inspired educator.

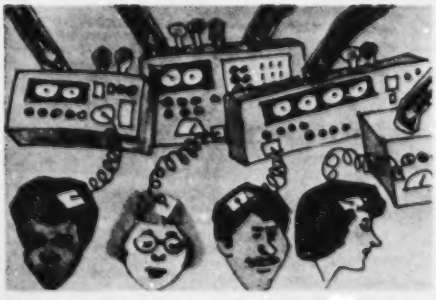


But what about the creators of all that wonderful media that the teachers are using in their lecture presentations? Are not the producers of these media, who labored so long and at great expense, entitled to reimbursement for their efforts? Here an interesting dichotomy exists.



The producers of instructional media realize full well that they cannot prosper without the educators, and the educators need the producers' products to help them in their teaching. Both parties agree in essence that some middle ground must be found where the producers can receive a reasonable compensation for their product, and the educators can achieve access to the media they desire.

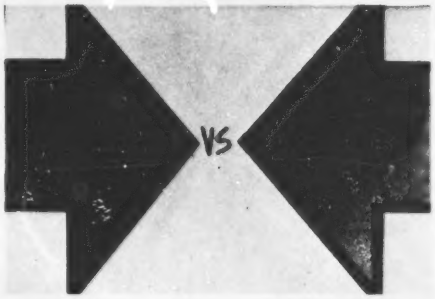
Within the provisions of the new Copyright Law is the creation of a Copyright Royalty Tribunal. This tribunal will serve to alleviate the situation just described and will simplify the means by which teachers can have access to copyrighted materials and at a reasonable price. I will discuss this tribunal later on in this presentation.



Electronic means of storing and retrieving knowledge are speeding up the learning process and thereby permitting more concentration on what has been learned.

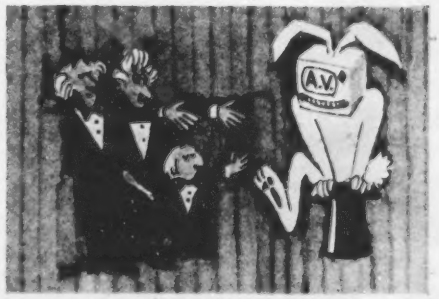
The future trends are quite clear. The process of learning, especially in biomedical education, will not be satisfied with merely providing factual knowledge. Students must be provided the tools of information transfer—to learn and relearn throughout their professional lives.

Keeping in mind the six basic needs of education, we must ask ourselves, does the new Copyright Act of 1976 meet the needs of education with regard to access to copyrighted materials? Before I discuss some of the highlights of the new Copyright Law, I would like to discuss briefly what the creator of an original work is entitled to in a statutory copyright of that work.



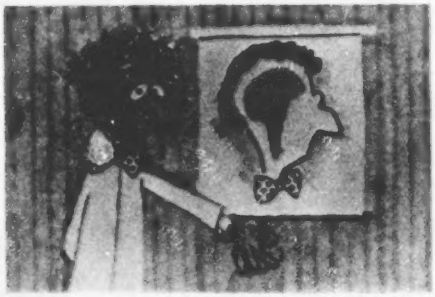
If he is the sole contributor to the work, he holds total rights to that property.

In a production where several persons contribute their efforts to the creation of a program, a composite work is the result. For example, the following contributors have rights in a typical medical audiovisual work.



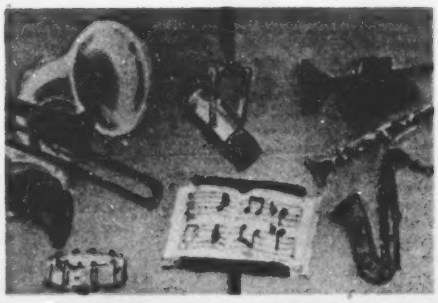
If a physician is featured as the principal actor who performs a surgical procedure, he has what is known as "performing rights."

The script writer has literary proprietary rights in the script he prepared for the production.

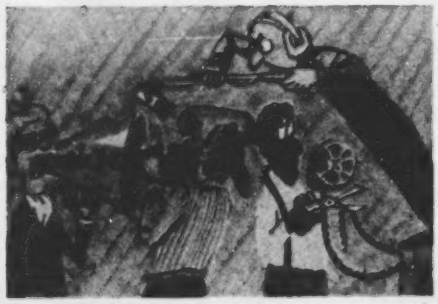


The owner or creator of any original demonstration models, charts, graphs, still pictures, motion picture or television footage used in the production has copyright in those.

If an off-screen narrator was used in the program, he has copyright in the use of his voice.



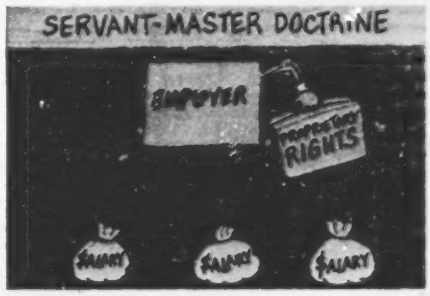
The same applies to the publisher of any music, the recording orchestra, recorded sound effects; all have rights in their contribution.



Finally, the director, videotape or film editor, sound recordist, cameraman, or anyone else who contributed special creative skills for the program also has rights in the production.

Each of the above has a separate and distinct right in the final creation, and the permission or release from each member should be obtained before the program is released. Usually the person responsible for obtaining all the necessary clearance is the producer or the project officer in charge of the contract performance.

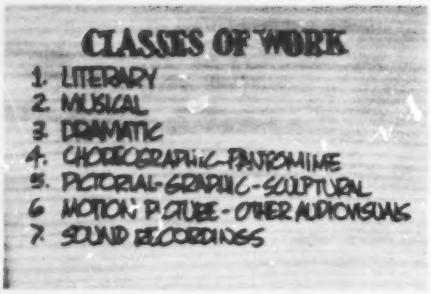
If all the contributors are employed as staff and are salaried, they relinquish their rights since these belong to the employer in keeping with the Servant-Master Doctrine, or the "work for hire" doctrine.

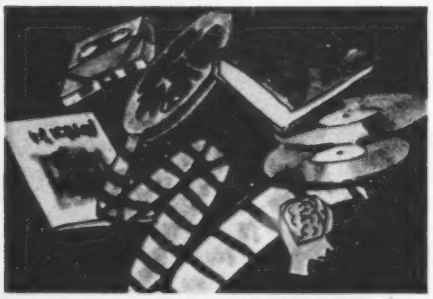


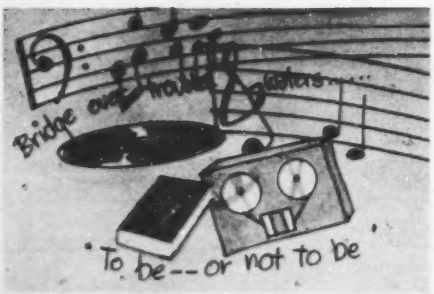
Where the creative contributor is an independent contractor, such as a free-lance script writer, he works for the producer for a flat price contract. He develops the script subject to the control and direction of the producer. The research and creative writing produced in the preliminary and final draft script delivered under the contract belongs to the producer who holds copyright in the work.

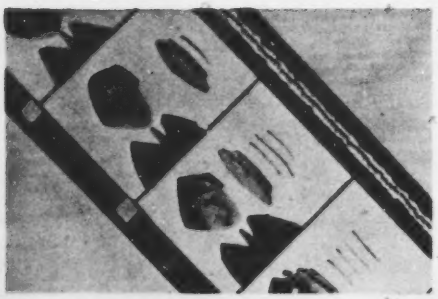
In those instances where an audiovisual program is produced by a faculty member of a medical school, ordinarily the rights in a work created by the professor in the scope of his employment would belong to the university or school. Generally, the proprietary rights would inure to the school, and the school would receive all the revenue produced by the sale or distribution of the work.

Some schools allow the creator of the work to receive all the revenue after the school recoups the basic production cost. Now to the highlights of the new copyright law.









The new law abolishes the old dual system of protecting works under the Common Law before publication and under Federal statutory protection after publication. This new law will grant exclusive Federal jurisdiction and will abolish any rights to original works under the Common Law statutes of a state that might be interpreted as equivalent to copyright, and therefore those works would come within the scope of the new Federal Law.

The new law reduces the classes of original works from 14 to 7, and these are:

1. Literary works.
2. Musical works, including any lyrics.
3. Dramatic works, including background music.
4. Choreographic works and pantomime.
5. Pictorial, graphic and sculptural works.
6. Motion picture and other audiovisual works.
7. Sound recordings.

The law defines "original works of authorship" which are fixed in a copy other than a phonorecord, from which the work can be perceived, reproduced, or otherwise transferred or communicated, either directly or with the aid of an optical or electronic playback device.

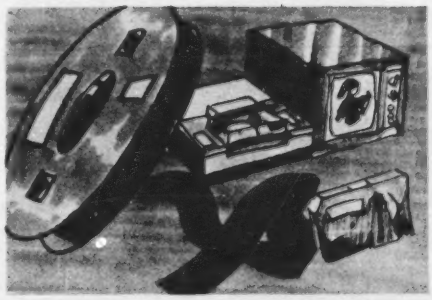
It should be noted that phonorecords defined in the new law are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known, or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecord" includes the material object in which the sounds are first fixed.

And speaking of definitions, motion pictures have acquired a generic term under the new law, and it defines them as audiovisual works consisting of a series of related images which when shown in succession, impart an impression of motion, together with accompanying sounds, if any.

To "perform" a work means to recite, render, play, dance or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

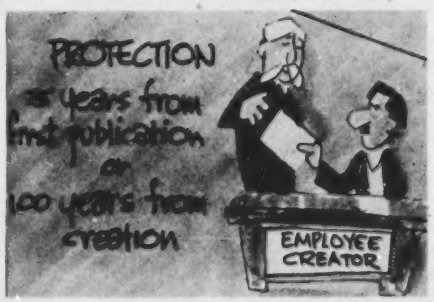
I deemed it important to dwell on these definitions, since under the old law, motion pictures were defined as a series of related images or frames on a piece of sprocketed film that could be perceived by the naked eye, or by using a projector to be enlarged and projected on a screen.

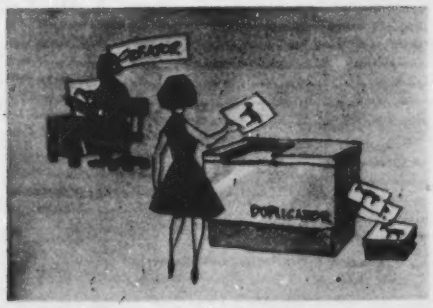
Videotape under the old law had no definition to provide for coverage in its classes of works that could be copyrighted. As a result, there are some legal opinions that contend videotapes could not be copyrighted until January 1, 1978, since they could not be given protection under the category of motion pictures as defined in the old law. As many of you may know, there is a suit pending that was filed before the new law went into effect that may produce a "landmark" decision that may well determine the future growth and use of home videotape recorders.

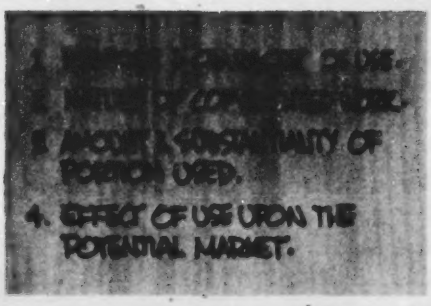


For those works already under statutory protection, the new law still offers the same copyright protection for a term of 28 years from date of publication or registration. This work can be renewed for a second period of protection, but this second term increases its protection for a period of 47 years or a total of 75 years. For those works created after January 1, 1978, the new law provides for a term of the duration of the creator's life plus an additional 50 years.

Where there have been "works" made for hire, the term of protection is 75 years from first publication or 100 years from creation, whichever is shorter.







The new law considers the employer as the "author" and does not base the term on the creator's life. The copyright duration of the author's life plus 50 years has been in effect in Europe for many years.

The new Copyright Act of 1976 puts the U.S. in conformity with most of the signers of the International Copyright Conventions which began in 1910 in Buenos Aires, and ultimately, a party to the Universal Copyright Convention as revised in Paris 1971.

The new law continues the ban on copyrighting of "works" of the United States Government, but clarifies its definition of works covered by the prohibition as those prepared by an officer or employee of the U.S. Government within the scope of that person's employment. However, Section 105 of the Act states that the U.S. Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest or otherwise.

The Copyright Act of 1976 adds a provision to the statutes recognizing the "doctrine of fair use." Generally, "fair use" is interpreted as a device in which copying someone else's work is done without permission or payment made to the holder of copyright. The definition and interpretation of "fair use" has never been placed within rigid boundaries in copyright jurisprudence. As a result, the distinction between fair use and copyright infringement has not been determined by any precedent or fixed rules or criteria.

In each instance, equitable adjudication was based on the following factors which are described in Section 107 of the Copyright Law entitled "Limitations on Exclusive Rights, Fair Use".

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. The nature of the copyrighted work;
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole, and
4. The effect of the use upon the potential market for or value of the copyrighted work.

The next Section 108 details the conditions by which a library or an archive may make reproductions of copyrighted works by any employee acting within the scope of his/her employment, without infringement of the Copyright Law. This section spells out the type of works that may be copied, but specifically exempts the rights of reproduction and distribution of musical works; pictorial, graphic or sculptural work; motion pictures or other audiovisual materials, except those dealing with news.

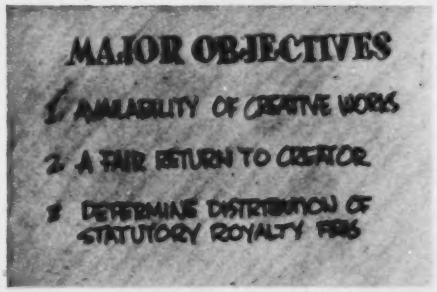
Another exception to the limitation or exclusion rights in this section deals with graphic or pictorial works published as an illustration, diagram, or similar adjunct to works of which copies can be reproduced and distributed in accordance with other provisions of Section 108. Undoubtedly, there will be situations where misinterpretations exist of what "fair use" allows under the new law, and some of these may reach a U.S. District Court for adjudication.

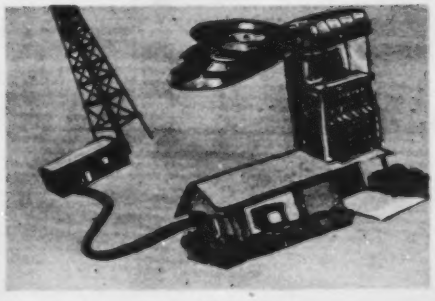
A Copyright Royalty Tribunal was created by the new act as an independent unit within the legislative branch. The membership of the tribunal is composed of five commissioners appointed by the President, with the approval of the Senate, for a term of seven years. Upon convening of the tribunal, the commissioners will serve for a period of one year. Thereafter, the commissioners will serve as chairman in rotation.

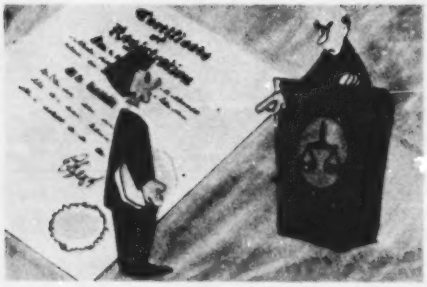
The purpose of the tribunal is to determine and establish reasonable copyright royalty rates. When these rates are established, they should achieve the following major objectives:

1. To increase the availability of creative works to the public;
2. To afford the copyright owner a fair return for his creative work, and for the copyright user a fair income under existing economic conditions, and
3. In certain instances, to determine the distribution of statutory royalty fees deposited with the Register of Copyrights that were generated by compulsory licenses for various uses of copyrighted materials.

The new act also provides for the compulsory licensing for certain copyrighted materials such as recording rights in music, public broadcasting, jukeboxes, and for secondary transmissions of copyrighted works on cable television systems.

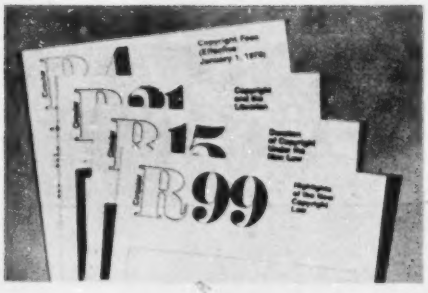

MAJOR OBJECTIVES
1 AVAILABILITY OF CREATIVE WORKS
2 A FAIR RETURN TO CREATOR
3 DETERMINE DISTRIBUTION OF STATUTORY ROYALTY FEES



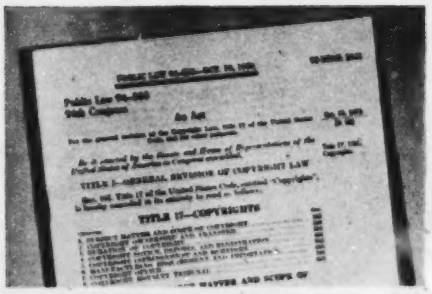


With the enactment of the new law, registration of an original work will not be a requisite of copyright protection. However, registration will be a prerequisite in the event of a copyright infringement action.

Copies or phonorecords of works, published with notices of copyright that are not registered, are required to be deposited in the collections of the Library of Congress. This deposit of original material is not a condition of copyright protection, but is in compliance with the provisions of the new law. The copyright owner will be held liable for certain penalties for failures to deposit such works after a demand to do so is made by the Register of Copyrights.

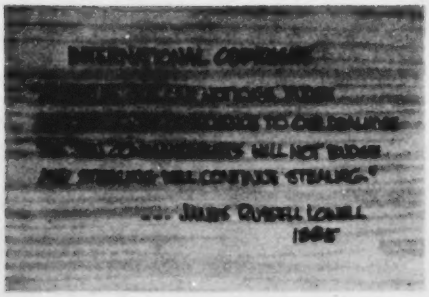


I know I have covered a lot of ground by just touching on the highlights of the new Copyright Act. Time does not permit a more in-depth deliberation of the new law. Copyright Law in itself is very complex. In order to reach an equitable adjudication of any action involving copyright infringement, each case is most dependent upon the specific facts and evidence supporting any particular litigation.



To quote Barbara Ringer, the Register of Copyrights, who commented on the revised law: "The bill as a whole bespeaks concern for literally hundreds of contending and overlapping special interests from every conceivable segment of our pluralistic society. It was not enough to reach compromise on a particular point; all the compromises had to be kept in equilibrium so that no one agreement did not tip another over."

There are certain cases now pending regarding copyright infringement that were filed under the provisions of the old law. When these are resolved and other cases are filed under the new law and put to a test in a court of law, can these produce new legal precedents or "landmark" decisions? Will this due process provide the crucible for the tempering and testing of the Copyright Act of 1976?



If the new law does not meet the challenge as intended by the framers of the new revision, then the philosophy in this old quatrain may still apply.

PART II.

DEFENSE OF PUBLIC LAW 94-553
COPYRIGHT ACT OF 1976

MARYBETH PETERS
Copyright Office
Library of Congress

THE SIX BASIC NEEDS OF EDUCATION

1. The right to make limited copies of copyrighted materials for classroom use.

The copyright law allows a certain amount of copying of copyrighted materials for educational purposes. Section 107 of the law provides that the fair use of a copyrighted work is not an infringement of copyright. Although fair use is not susceptible to precise definition, it is generally defined as allowing copying without permission from, or payment to, the copyright owner where the use is reasonable and not harmful to the rights of the copyright owner. The copyright statute sets forth four factors that courts are to consider in deciding whether or not a particular use is fair. They are: 1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; 2) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; 3) the nature of the copyrighted work; and 4) the effect of the use upon the potential market for or value of the copyrighted work. It is generally conceded that the last factor is the most important.

In the educational context, two items are worth noting. In defining examples of when the fair use defense would come into play, the law includes "teaching (including multiple copies for classroom use)." Second, as mentioned above, a valid consideration as to the purpose and character of the use is whether "such use is of a commercial nature or is for nonprofit educational purposes."

2. The need to have the doctrine of "Fair Use" extended to include educational broadcasting and the educational use of computers.

The fair use doctrine is applicable to all types of works and all types of educational uses. For example, the House Report (H. Rep. 94-1476) states:

> *The concentrated attention given the fair use provision in the context of classroom teaching activities should not obscure its application in other areas. It must be emphasized again that the same general standards of fair use are applicable to all kinds of uses of copyrighted material, although the relative weight to be given them will differ from case to case.*
>
> *The fair use doctrine would be relevant to the use of excerpts from copyrighted works in educational broadcasting activities not exempted under Section 110(2) and 112, and not covered by the licensing provisions of Section 118. . . . The availability of the fair use doctrine to educational broadcasters would be narrowly circumscribed in the case of motion pictures and other audiovisual works, but under appropriate circumstances it could apply to the nonsequential showing of an individual still or slide, or to the performance of a short excerpt from a motion picture for criticism or comment.*

The fair use section of the law clearly applies to educational use of copyrighted material through computers.

3. The need for a reasonable certainty that a given use of copyright material is permissible.

The Report of the House of Representatives noted specifically that there was a "need for greater certainty and protection for teachers." To aid in the interpretation of the fair use section of the law, and especially to clarify the fair use doctrine for teachers at all levels, a set of minimum guidelines was drawn up by representatives of educators, publishers, authors and composers. These guidelines cover only copying for teachers and students in nonprofit

educational institutions and to copying of musical works and material in books and periodicals. These guidelines only state the minimum; copying which does not fall within the minimum guidelines may nonetheless be permitted under the doctrine of fair use. The guidelines cover the reproduction of single copies for teachers, multiple copies for classroom copying and contain certain prohibitions. The multiple copying for classroom use cannot exceed the number of pupils in the class, must meet strict tests of brevity, spontaneity and noncumulative effect; and must include a notice of copyright. These guidelines are printed in House Report 94-1476, pp. 68-72. (The fair use section of the law and all of the guidelines are reproduced in Copyright Office Circular R 21 which may be obtained free of charge by writing to the Copyright Office, Library of Congress, Washington, D.C. 20559.)

No audiovisual guidelines were worked out, principally because the variety of interests involved, such as actors, directors and writers guilds, television broadcasters and film producers, were unable to successfully conclude their deliberations. The House Report does indicate that fair use does have a "limited" applicability to off-air taping for educational nonprofit use. One relevant legal action on the subject of off-air videotaping should be noted. Three educational film producers sued a school cooperative in Buffalo, New York in 1977. The case involves taping off-the-air, the making and distribution of duplicate copies for classroom use, and performance in classrooms, allegedly all without permission. The judge granted the plaintiffs a preliminary injunction and ordered the defendant to cease copying plaintiffs' films.

Section 108(f)(3) of the new copyright law allows a library [as defined in Section 108(a)] to make a copy of all or a portion of an "audiovisual news program" and to distribute by loan a limited number of copies provided that the loan does not have as its purpose any direct or indirect commercial advantage. The Conference Report (House Report 94-1733) defines "audiovisual news program" as local, regional or network newscasts, interviews concerning current news events, and on-the-spot coverage of news events. This exemption was not intended to include documentaries or programs such as "60 MINUTES."

4. The need for protection of teachers and librarians should they innocently infringe the law.

For the first time the copyright law has "innocent infringer" provisions. Section 504(c)(2) deals specifically with the special situation of teachers, librarians, archivists, and public broadcasters, as well as the nonprofit institutions of which they are a part. This section provides that, where such a person or institution infringes copyrighted material in the honest belief that what they were doing constituted fair use, the court is precluded from awarding any statutory damages. The law also shifts the burden of proof from the teacher or librarian to the copyright owner. The Conference Report clarified the definition of "teacher." It states that it was meant to include "instructional specialists working in consultation with actual instructors."

5. The need to meet future instructional requirements by utilizing new educational technology presently available to schools.

The doctrine of fair use is completely applicable. If the criteria of Section 107 are met, fair use would apply. The House Report specifically mentions this. It states:

> *[T]he endless variety of situations and combinations of circumstances that can arise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no*

disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. (Emphasis added.) Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.

6. The need to have ready access to materials.

Fair use copying involves no permission. Therefore, all of the copying that meets the fair use criteria can be done at the "teachable moment." Where the copying goes beyond fair use, then permission must be sought or one must take advantage of the Copyright Clearance Center, Inc. or authorized reprint services. I believe that copyright owners will be responding to requests in a timely fashion. Also, trade associations are helping the educator locate the appropriate permissions person. For example, the Association of Media Producers has published a Directory of Rights and Permissions Officers which includes the name of the appropriate person, the telephone number of that person, and the address.

PART III.

TEN CASE HISTORIES

CARL FLINT
National Medical Audiovisual Center
National Library of Medicine

25

FOREWORD

The passage of the Copyright Act of 1976 has provided for the creators of original works a prolongation of copyright protection for their works. The educators, in turn, have received some assurance that access to copyrighted works under the new act was now possible without the fear of penalty of copyright infringement.

In learning to live with the Copyright Act of 1976, many of the situations portrayed in these ten case histories may well leave the fantasy of fiction and enter the real world of copyright encounters of a new kind.

CASE NUMBER 1

Chester Chippen and Ernest Endevore were both professors at the Milltown Medical College. They were friends for many years, collaborating on many projects and were both known in their community for their prodigious publications.

Chester had recently written a brilliant article on "Gallstone Dissolution." When he read his paper at a professional seminar, it was well received, although some clinicians compared the treatment and therapy involved as somewhat akin to "getting a haircut from the inside." Professor Chippen always wrote at night in his study, at his own expense. He copyrighted all his articles and enjoyed the modest financial returns from the sale of his writings.

Professor Endevore also burned the midnight oil at his home and was hard at work writing an encyclopedia on internal medicine. He was quite a persuasive person and got many of his colleagues to write specific chapters for the encyclopedia. He did not pay them for their contributions but impressed upon them the great exposure their works would get, especially under the aegis of his editing and authorship. Ernest had read Chester's article on "Gallstone" and decided that it must be included in his work. He asked Chester for permission to include the article as a chapter in the book. Chester was aware of the great undertaking. He was also impressed by the publisher's reputation for putting out an outstanding publication. Chester agreed and told Ernest he could use his article, but that he could not edit or change a single word or punctuation mark. To this Ernest agreed, and so "Gallstone Dissolution" took its place among the many other fine writings in the encyclopedia.

When the book was published, it got lukewarm reviews as a textbook. However, Professor Chippen's chapter got rave reviews, and soon Chester had to print thousands of copies of his article and enjoyed a more than average return on a single article.

The publisher, smarting from the mild reviews and lack of sales, became incensed over Chester's good fortune. He sued Chester for copyright infringement, alleging that Chester was infringing upon the copyright of the encyclopedia.

Did the publisher have a case?

CASE NUMBER 2

Clare Crystal, a medical librarian, was mistress of a large media resources library. She understood the problems involved with the storage, retrieval, and management of audiovisual materials. She devised a unique system for check-outs and check-ins of software and hardware. She also designed simple but effective work order forms for the users to complete when they desired copies of articles, slides, inter-library loans, etc. Clare was adored by the faculty and students of the school because she was so knowledgeable, friendly, and always eager to help.

Professor Ralph Rumph of the School of Veterinary Medicine stopped by Clare's desk and returned a 16mm film he had borrowed. He told Clare that it was an excellent film and asked that she duplicate a portion that he had measured and marked for his classroom use. Clare quickly reminded Professor Rumph of the new copyright law and of the four basic criteria that determined if there was any infringement of copyrighted works. She quoted criterion number 3 of the Limitations on Exclusive Rights: Fair Use, which stated, "the

amount and substantiality of the portion used in relation to the copyrighted work as a whole." Ralph quickly allayed her fears by telling her that the film ran thirty minutes. All he wanted duped was 2½ minutes. Certainly this tiny segment that he wanted duplicated would not affect the use and sale of the potential market of the original work. Clare was reassured and relieved to hear that Professor Rumph's request was so modest. She filled out a work order indicating the portion to be duplicated and hand-carried it to the school's television facility.

The following week Professor Rumph was delighted with the duplication. It taught in 2½ minutes what had taken two hours to demonstrate by the lecture method.

When the next class of first-year veterinary students arrived, an unusual coincidence occurred. Among the students attending Professor Rumph's lectures was the son of the producer of the film that Ralph had duped. The son told his dad that he had seen an amazing portion of a film in class that showed the birth of a "five-toed, doublebreasted aardvark." The producer asked whether the aardvark had green and yellow stripes on its double breast, to which the son answered in the affirmative.

The next day the producer visited the school and talked to Clare. The following week Clare, Ralph, and the TV engineer were all served with a petition to restrain further use of the duped version of the film. The petition also sought substantial damages.

What could have upset the film producer to the point of taking legal action? After all, it was for schoolroom, nonprofit use and was a measly 2½ minutes of his film.

CASE NUMBER 3

Robert Redboard, a junior medical student at the Spelvin Medical College, was also an expert in covert sound recordings. He rationalized that instead of taking copious notes in the classroom, he would rather record the lectures. The school had no policy prohibiting the use of tape recorders in the classrooms. Robert utilized a miniature "shotgun mike" and a miniature battery-powered recording deck and started taping all his classroom lectures. Back in the dorm, Robert's classmates were really impressed with the quality of the recordings and wanted copies of the lectures for their own use. Soon Robert was in a lucrative enterprise of making copies of his tapes and selling them on campus.

Dr. Boan, a professor of anatomy, was surprised and somewhat disconcerted when he saw one of Robert's audiocassettes neatly packaged and labeled with his lecture on Anatomy of the Skull. He knew about the students' taping of his lectures. He often cooperated with some of the students by allowing them to place their tape recorders or microphones close to the lectern. This sudden discovery was shocking. He was greatly incensed. He recalled all the time he devoted to research and writing that went into his lecture, and here this junior medical student was making money from his labors. Further, he was not getting a cent or any credit on the label as author. He was furious. What should he do? What could he do? He was just about to call his lawyer when he recalled an old adage often quoted by a close friend, a professor of law at the university. "He who seeks equity must come into court with clean hands." He wondered, "How clean are my hands?" He knew his research and writing took him into a host of copyrighted works. He also recalled another quote often spoken in jest about the definition of research. "Research is plagiarism" from more than one source. On second thought, perhaps he should not institute an action to restrain Robert.

Could Professor Boan get a court order to stop Robert from selling his lectures?

CASE NUMBER 4

Herbert Humbrage, a producer of medical films, sold one of his better productions, a color 16mm film, to Sydney Syndroam, M.D., a professor of medicine at Mundane Medical College.

Since the school paid for the film, Sydney had no qualms about shelling out $800 for this hour long production. He had seen this film at the last meeting of his professional society and was so impressed with the content that he could hardly wait to unlimber his electronic "blue pencil" to make this film into a better teaching tool. Sydney reasoned that Herbert, like all medical film producers, espoused the philosophy that "more was better." How wrong this was. Sydney enlisted the aid and assistance of the school's director of media services and skillfully edited the hour long film into fifteen 3-minute segments. The school's television facility made this easy, so easy in fact, that Sydney decided to renarrate each segment, because the sound track after the edit sounded a bit unsynchronized.

Sydney's masterful edit evoked praise from his colleagues. They complimented him on his unique ability to cut through all the extraneous material and to encapsulate only those portions of the film that had relevance to the curriculum. Sydney made a few copies for his friends and his professional society.

Herbert found about about Sydney's surgery to his film. He called Sydney and told him what he thought about Sydney's mutilation. He also informed him that he was starting an action to restrain him from further exhibition and also to sue him for copyright infringement.

Sydney reacted in astonishment. After all, he took Herbert's omnibus vehicle and gave it a new form and substance as a superb series of lecture support material. Why should Herbert be so angry? Didn't he buy the print for $800? And since the school owned the film, they could use it in any manner that they desired, especially since they were not making any financial gain from its use.

Could Herbert get an injunction to restrain Sydney?

CASE NUMBER 5

In June 1977, Media Services, a division of a large state educational system, was sued by several producers of media alleging that Tyler Twitty, Chief Engineer of the Media Services television facility, and Tracy Trumble, Director of the Media Services, were guilty of infringing their copyrighted productions. The petition prayed for a directed verdict from the Court.

Tracy and Tyler conceived a new service that they would offer to all the member schools throughout the state. They convinced the State Board of Education that they could provide a new worthwhile service to the schools by using their new television equipment to make off-the-air recordings of selected films and videotapes and, in turn, make 3/4" videocassette copies which would be sent to the member schools for on-site use.

When the Vice-President of the State Board of Education questioned Tracy and Tyler on the legality of making such copies, they replied as follows:

1. They would be using the copies for face-to-face education in the respective classrooms.
2. The copying was in keeping with fair use, since they were not charging for the tapes nor were they being shown for any financial gain.

3. That under the existing copyright law, the Copyright Office cannot grant protection to videotaped works under the description and generic format of motion pictures.

The Vice-President and the other members of the Board were impressed by the answers given by Tracy and Tyler and authorized them to begin their new service to the schools.

When the producers' petition was filed in the U.S. District Court, Media Services received an injunction restraining them from further off-air taping and ordering them to cease distribution of the copies they had already made.

Keeping in mind the petition was filed under the old Copyright Act and did not come to trial in 1977, but was scheduled on the Judge's docket for 1978, what do you think the outcome will be?

CASE NUMBER 6

Harvey Harroun, D.D.S. was a "Blue Ribbon" teacher at the Dalton School of Dentistry. If the adage "Publish or Perish"was ever used to measure the output of Harvey's publications, he would not perish from this earth for many light years to come. His books and articles always sold well, and he liked to stop by the school bookstore whe- .ie would occasionally autograph one of his textbooks for an adoring coed.

On his last trip to the bookstore, he picked up a trade journal which listed new audiovisual releases. Now, why didn't he think about putting his efforts into producing a series of dental videotapes? After all, he could easily become a "Blue Ribbon" producer. He decided to do a TV series on "Dental Restoration." His research would be minimal since he had written four volumes on the subject.

Harvey was a quick study. He looked at many dental videotapes, spotted many errors in the instructional design and production quality, and soon had three scripts ready for his first TV series. He consulted with Kenneth Keene, who was the Director of Media Services for the school. Ken complimented Harvey on the quality of the scripts and said it would be a pleasure to produce these tightly edited shooting scripts. He was delighted to see that not one close-up of a large "talking head" dwelled among the pages of the scripts. The scripts were loaded with more didactics than calories in a "corn pone." This three-part series would bring them world acclaim.

Harvey, Kenneth, and the production crew went to work, and in ten days produced a very professional series of dental teaching tapes. Harvey made a deal with a local commercial TV station to produce release copies. Prior to the making of sale copies, he filed for and received a certificate of registration of copyright in his name from the Copyright Office. Upon receipt of the certificate, he had the TV station crank out the release copies which were placed for sale with the college bookstore. The tapes were an immediate success, and the demand for them went beyond the campus. The word-of-mouth advertising brought many sales from other dental schools.

The Chancellor of the University became aware of the dental tapes, and after checking the sales volume and the manner in which Harvey produced these tapes, ordered the General Counsel of the University to prepare a petition with which to restrain Harvey from further sales, notified the bookstore not to sell anymore tapes, and also instructed the Counsel to file for re-registration of copyright naming the University as proper holder of copyright.

As the weight of the Chancellor's action bore down on Harvey, he was also served with a petition from his favorite publisher, who also instituted an action for copyright infringement of the four volumes Harvey had written for them. In addition, the petition also named

the University and Kenneth Keene as co-defendants. Harvey, glass in hand, thought, "A guy can really perish from publishing."

Did the Chancellor have the basis for an action against Harvey? Did the publisher have an action against the University, Harvey, and Kenneth Keene?

CASE NUMBER 7

Edmund Edelweiss, President of Galaxy Productions, was the successful bidder and recipient of a contract award from the National Academy of Space Medicine (NASM). This was Galaxy's first government contract, having unsuccessfully bid for other federal contracts since the founding of Galaxy Productions in 1934.

Edelweiss was on "cloud nine" with the award, since the rent for the studio was in arrears. He gathered his production staff, and singling out his creative writers, charged them with producing an outstanding script which would satisfy the work scope and objectives of the contract.

Filbert Finnegan, the Project Officer for NASM, worked closely with Galaxy during the script development. He told Edmund that NASM was depending on Galaxy to produce an outstanding film, since the production would contribute greatly to the public's orientation to the problems of interplanetary space travel that would soon become a reality. Filbert gave the agency's final approval of the last draft of the script, and shortly thereafter "GAS, A Space Odyssey" was in production.

"GAS" was in labor for nine months, and Edelweiss delivered a block-buster of a film on time and within the budget, as specified in the contract. NASM was delighted with the film. A special answer print screening was set up for the top officials of the agency. As the music and the main titles rolled by, the General Counsel for the Academy noted that Edelweiss had put the copyright symbol © , and Galaxy Productions, all rights reserved, 1978, on the main title. The attorney whispered to Filbert who was sitting next to him that the copyright notice should be removed before making the distribution prints. This Filbert did, and soon had 300 release prints in distribution.

The film was shown to the public on network television and in theatres nationally. "GAS" was an unqualified 4-star hit. Edelweiss, upon seeing one of the first public screenings of the film, reacted violently to the removal of his copyright notice. He called his lawyer and instructed him to file suit against NASM for copyright infringement.

Could Galaxy Productions get an injunction restraining NASM from exhibiting "GAS"?

CASE NUMBER 8

Paul Plummer was the director of a large film and videotape distribution program at a leading medical school. Paul not only served the school but also the needs of many other medical schools and professional societies. The off-campus distribution services were the result of Paul's hard work and innovative promotional campaigns.

At one of the many professional meetings Paul attended, he was taken to task by one of his peers who chided him about his high-powered promotional program. He told Paul that the quality of his promotional material was in many instances superior to the films and

videotapes he was distributing. Could he not devise a better system of informing his user community of the contents of his lending library?

Upon his return he was greeted by Stanley Toole, the Director of the school's Media Services. During their coffee break, Paul recounted his problem of trying to find a better way of promoting his collection. Stanley listened attentively, and at the right moment broke into Paul's recitation. "Relax, Paul. Technology will come to your rescue." He told Paul in detail how they could abstract the salient portions of his film and videotape collection by using his new television equipment. They would make 2- to 3-minute videotape abstracts and record as many as ten segments on a 3/4" videocassette. In this manner the user could see the salient portions of the audiovisual and quickly judge whether they wanted to borrow the complete film or tape. They could not miss. Hollywood has been making abstracts for years, only they called them "trailers." Paul, overcome with emotion at this turn of events, ran to the lunch counter for more doughnuts to fuel Stanley's enthusiasm. They were about to introduce a new era, the first audiovisual catalog of selected films and videotapes for the health sciences community.

Six months after the coffee and doughnut orgy, Paul and Stanley had abstracted enough material from the collection to produce fifty 3/4" videocassettes. Stanley made sufficient copies and Paul entered them in his distribution program. Proper promotional material was prepared and distributed to announce this new service to the community.

Seven months, A.D.D. (after dunking doughnuts), the circulation figures for Paul's distribution program spiraled upwards indicating an unqualified success for their audiovisual catalog.

Nine months, A.D.D., the medical school, Paul Plummer, and Stanley Toole were served with various petitions from irate producers seeking remedy against them. One of the counts on one of the petitions asked for $300 damages per copyright infringement.

Where did Paul, Stanley, and the school go wrong?

CASE NUMBER 9

Lawson Couche, a professor of psychiatry, bought a print of a motion picture that was produced by a colleague, Marvin Moon. Marvin enjoyed a good reputation as a psychiatrist and as a producer of teaching films. That latter activity was strictly a moonlighting operation. The print Lawson bought was of a new release depicting a step-by-step approach to psychiatric interviewing.

Lawson screened the film several times to determine how best to incorporate it into a new lecture series he was preparing. The more he screened the film, the more he became aware of its shortcomings. He decided that in order to utilize the film, he would have to rearrange its contents. He met Marvin in the faculty dining room and diplomatically told him of his difficulty in trying to work his film into his lecture series, and good-naturedly took him to task for his derelictions. This friendly critique of his film by his long-term friend Lawson promptly soured Marvin's stomach. It seems he was told the same thing by other colleagues who also screened his film.

Marvin, keeping his cool, told his friend defensively that he was sorry that Lawson was ignorant in the ways of educational design, that the film when screened by their peers was thought to be an outstanding instructional module, and that he had documentation and awards to prove his point. He suggested to Lawson that he work his lecture around the film, thereby saving time and energy and still doing a bang-up job of teaching "psychiatric inter-

viewing." Lawson, smarting from this put down, knew exactly how to handle the problem, and he did.

With the beginning of the new semester, Lawson's classes were full, and the word of mouth of his students' praise for his lecture on psychiatric interviewing ranged far and wide. Marvin Moon, hearing about this "blue ribbon" lecture, decided to sneak in on one of the lectures. Wearing a false beard and dark glasses, Moon sat in the back row behind a pillar and watched Lawson's rearranged version of the film he had produced. He was livid with envy at the improvement. Later that day he stormed into Lawson's office and demanded that Lawson stop using the mutilated version of his film. Lawson retorted to this assault by reminding Marvin that he bought the print, that he owned the proprietary rights of the copy he bought, that he could do anything he wanted with it. Besides, he told Marvin, he had overpaid for the value of the film. He was also not making any financial gain from his edit, nor did he violate the copyright by making a copy. Marvin, in response, told him he could do anything he wanted with the print in the privacy of his home, but he could not show his mutilated film in a public forum such as the classroom. Further, if Lawson persisted in showing the film, he would seek a court ordered injunction to restrain further use of the edited film.

Could Marvin get an injunction to restrain Lawson?

CASE NUMBER 10

Luther Lacrimoze, contract officer for the National Academy of Trauma (NAT), awarded a contract to Disaster Productions for the filming of a production detailing the vital need for first aid in the prevention of shock.

Had Luther pulled a facilities check, he would have learned that it was a two-man operation, housed in a 1963 Chevy Van. Danny Dulle, in spite of his tender years, knew the film business from A to B. Danny functioned as producer, writer, director, and cameraman. Larry Lusher drove the truck, handled the sound equipment, served as electrician, and also the grip. The van also was equipped with a short-wave radio and an FM stereo radio, always tuned to a popular FM station.

Danny and Larry spent several days glued to the police frequency. They answered many police calls but could not find any disasters worthy of documenting. One day their big moment arrived. They responded to a police call that involved a twelve car pile-up, all going the wrong way on a one-way street. Disaster Productions arrived on the scene just at the right time, beating the medics and ambulances by five minutes. Danny and Larry hit the ground as the van stopped rolling and started live sound photography as soon as the medics started treating the wounded. Danny couldn't have staged the action better if he were following the script. He was getting great coverage. The realism was stark with gore to match, and the sound recording was sensational.

Unknown to Danny, Larry left the FM radio playing when he bailed out of the van, and in the commotion and background noise, they did not hear a particularly sad melody that was being picked up by Larry's sensitive microphone. As a matter of fact, this and other music was being recorded along with the live sound dialogue exchanges between the medics, the wounded, and especially the footage of a priest who was giving the last rites to a critically wounded motorist.

When the processed film and sound tracks were assembled, Danny and Larry were ecstatic with the results. When they synced up the sound with the edited footage, they were sur-

prised to hear the music in the background. When they came to the footage of the "last rites," the music became more pronounced, since that sequence was shot in fairly quiet surroundings. It was an emotional happening, and they were both moved to tears. The music played to the sequence as if it were cut to the action. How lucky could they get.

Ten days later they delivered the answer print to NAT, where Luther Lacrimoze arranged a screening for the members of the Academy. There was not a dry eye in the projection room when the lights came on. Luther was told to get the film into distribution immediately. Within 30 days the film was seen all over the country on the leading television networks.

Octave Hyer, the composer of the music that Larry had recorded, was surprised to hear her music in the film when it was televised and called her publisher and took him to task for not telling her that he had licensed Disaster Productions to use her music. When he told her he had not seen the film nor had he ever been contacted by Danny Dulle regarding the use of the music, they both agreed that they had Disaster over a barrel. Did they?

A second disaster visited Disaster Productions a short time later when Luther Lacrimoze notified Danny Dulle that NAT was in receipt of a court order restraining further distribution of the film. It seems a class action was filed by the plaintiffs, naming the medics, the wounded motorists, and the priest, who claimed that their performance rights in the film were violated. Were they violated?

PART IV.

CONCLUSIONS TO CASE HISTORIES

CARL FLINT
National Medical Audiovisual Center
National Library of Medicine

CONCLUSIONS

Case Number 1: Section 201(c) - Contributions to Collective Works: Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole and vests initially in the author of the contribution. Chester had secured statutory copyright registration for his article. He retained his rights in the article even though it was published in a collective work.

Case Number 2: Section 108 - Limitations on Exclusive Rights: Reproduction by libraries and archives, paragraph h of 108, states: The rights of reproduction and distribution under this section *do not* apply to a musical work, a pictorial, graphic or sculptural work or a motion picture or other audiovisual work other than an audiovisual work dealing with news.

Case Number 3: Depending upon the research Dr. Boan performed in presenting his lecture, in effect he did create an original work. He could restrain Robert.

Case Number 4: Sydney and the school acquired proprietary rights to the one print of the film he bought from Herbert. Sydney or the school did not acquire the rights to make and distribute derivative works of the original production. Herbert could restrain Sydney.

Case Number 5: Media Services is definitely in violation of Fair Use, and infringement of copyright of original works. Court decision would rule in favor of plaintiffs even though the petition was filed in 1977.

Case Number 6: Harvey should have stuck with writing. The school was Harvey's employer; therefore, he created a work for hire. He used school time and facilities to produce the tapes. Therefore, the school could restrain the sale of the dental tapes and secure copyright in the name of the school. As to the publisher's action, he did have the right to seek remedy from the university, Harvey, Kenneth Keene and any other school employee that participated in producing the works based on the four volumes written by Harvey and to which the publisher held the copyright.

Case Number 7: No! First, the "Rights in Data" clause, contained in the general provisions of the government contract, specified that the contractor will not place any restrictive markings on the deliverable items as called for in the scope of work. It also stipulates that the government has the right to obliterate such markings. Secondly, no works of the U.S. Government may be copyrighted. However, the government is not precluded from holding copyright by assignment, bequest or otherwise.

Case Number 8: Paul, Stanley, and the school should have requested written permission from the producers of the copyrighted audiovisual productions from which they had made the visual abstracts. In essence, they made derivative works of the original creation, made multiple copies of each, and then placed them into distribution. This was definitely an infringement of copyright. Therefore, the lawsuits were in order.

Case Number 9: Marvin Moon could get an injunction to restrain Lawson. When Lawson purchased the print from Moon, he acquired only the proprietary right of that print. He could edit the print or use it in any manner he desired - BUT - in the privacy of his own home or similar private circumstances. However, when he exposed the edited print, which in essence may be construed as a derivative work, in a public forum on a repetitive basis, he was in violation of Moon's copyright of the original work.

Case Number 10: Danny Dulle must pay for the use of the music that was composed by Octave Hyer and published by her publisher. The plaintiffs of the class action could seek remedy since they did not sign any performing releases nor did they receive any compensation for their part in the film. They were entitled to exercise their rights under the invasion of privacy and also the violation of the performance rights.

PART V.

GENERAL REFERENCES

1. "HEARINGS" before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, Eighty-Ninth and Ninetieth Congress. 1965-1967.

2. Public Law 94-553, General Revision of Copyright Law, 94th U.S. Congress October 19, 1976.

3. General Guide to the Copyright Act of 1976, September 1977. U.S. Copyright Office, The Library of Congress.

4. House of Representatives, 94th Congress, Conference Reports, No. 94-1476 and No. 94-1733.

5. FLINT, C. Implications of Copyright in the Use of Audiovisuals for Education. LL.M. dissertation, November 1970.

6. FLINT, C. 1977. Legal and Ethical Aspects of Proprietory Rights to Federally Funded Media Programs. *The Journal of Biocommunication,* November 3, 1977.

☆ USGPO 1979—644—271

5K3168779